***Information Item*: Overview of recent Court of Appeals decisions construing easements and riparian rights along public freshwater lakes and request for input concerning development of a nonrule policy document to assist in distinguishing private easements and public easements**

This information item reviews *Kranz v. Meyers Subdivision Property Owners*, 969 N.E.2d 1068 (Ind. App. 2012) ["*Kranz* 1"] and *Kranz v. Meyers Subdivision Property Owners*, 973 N.E.2d 615 (Ind. App. 2012) ["*Kranz* 2"]. *Kranz* 1 and *Kranz* 2 were decided by a Commission administrative law judge, reviewed by the Commission's AOPA Committee, affirmed by the Starke Circuit Court, and affirmed with published opinions by the Court of Appeals of Indiana. They consider several fundamental issues pertaining to DNR and Commission regulatory authority on public freshwater lakes, including disposition of proprietary interests, identification of riparian zones within public waters, and inverse condemnation (a form of constitutional "takings").

Also considered briefly is *Bass v. Salyer*, 923 N.E.2d 961 (Ind. App. 2010). *Kranz* 1 and *Bass* illustrate two distinct lines of judicial decisions pertaining to the application of easements to riparian rights. *Kranz* 1 illustrates the potential consequences of a private easement. *Bass* illustrates the consequences of a public roadway (sometimes referred to as a public easement). Input would be requested from the Commission concerning the possibility of developing a nonrule policy document to assist in application of these two lines of judicial decisions.

Copies of *Kranz* 1, *Kranz* 2, and *Bass* are attached.

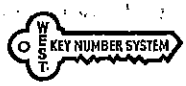
["*Kranz* 1"]

Kranz v. Meyers Subdivision Property Owners, 969 N.E.2d 1068 (Ind. App. 2012)

ing his vehicle on a public street violate the state constitutional prohibition against double jeopardy. Accordingly, we reverse and remand with instructions for the trial court to vacate the operating while intoxicated conviction.

Reversed and remanded.

BAILEY, J., and MATHIAS, J., concur.



Gunther KRANZ and Carol Kranz, Appellants–Petitioners,

v.

MEYERS SUBDIVISION PROPERTY OWNERS ASSOCIATION, INC., Christopher Bartoszek, and Indiana Department of Natural Resources, Appellees–Respondents.

No. 75A03–1112–PL–577.

Court of Appeals of Indiana.

June 27, 2012.

Background: Owners of servient estate lakefront property, which was subject to easement held by other subdivision residents sought judicial review of Natural Resource Commission (NRC) which determined that the easement holders were entitled to place a group pier at the end of the easement and which required property owners to move their own pier to accommodate that pier. The Circuit Court, Starke County, Roger V. Bradford, J., affirmed, and servient estate owners appealed.

Holdings: The Court of Appeals, Crone, J., held that:

(1) NRC had jurisdiction;

(2) NRC properly located group pier entirely within servient estate owners' riparian zone;

(3) evidence was sufficient to support determination that new configuration of piers remedied original reasons for denying permit for group pier; and

(4) decision did not constitute a taking.

Affirmed.

1. Administrative Law and Procedure ⇐305

The powers of administrative agencies are limited to those granted by their enabling statutes.

2. Administrative Law and Procedure ⇐447.1

A party cannot confer jurisdiction upon an administrative agency by consent or agreement.

3. Administrative Law and Procedure ⇐303.1

Any act of an agency in excess of its power is ultra vires and void.

4. Judgment ⇐27, 489

Judgments rendered without personal or subject matter jurisdiction are void and may be directly or collaterally attacked at any time.

5. Courts ⇐37(1), 39

Subject matter jurisdiction cannot be waived, and courts at all levels are required to consider the issue sua sponte.

6. Water Law ⇐1290

Natural Resources Commission (NRC) had jurisdiction to consider whether owners of lake access easement were entitled to a permit for a group pier at the end of their easement and to determine the scope of the access or riparian rights. West's A.I.C. 14–11–1–6, 14–26–2–3, 14–26–2–5.

7. Water Law ⇐1290

Natural Resources Commission (NRC) has jurisdiction to determine the scope of a lake access easement or riparian rights to the extent necessary to carry out the process of issuing permits for the placement of piers on public freshwater lakes. West's A.I.C. 14–11–1–6, 14–26–2–5, 14–26–2–23(c), (e)(2).

8. Water Law ⇐1290

Natural Resources Commission (NRC) properly located group pier entirely within servient estate owners' riparian zone and at least five feet from each boundary of that riparian zone; NRC also appropriately created buffer of 16 feet between group pier and servient estate owners' own pier. 312 IAC 11–4–8(c)(1).

9. Water Law ⇐1231

Generally, a property owner whose property abuts a lake, river, or stream possesses certain riparian rights associated with ownership of such a property.

10. Water Law ⇐1235, 1241, 1242, 1250(2)

Riparian rights are special rights pertaining to the use of water in a waterway adjoining the owner's property, and may include access, swimming, fishing, bathing, boating, and installation of a pier.

11. Water Law ⇐1284

Holders of a lake access easement do not acquire riparian rights, but may acquire the right to use the riparian rights of the servient tenant.

12. Water Law ⇐1290

Evidence was sufficient to support Natural Resources Commission (NRC) determination that new configuration of piers remedied original reasons for denying permit for group pier at end of easement; conservation officer testified that his primary concern was that the existing configuration of the piers created narrow corridors, which would make navigation more difficult and pose a threat to the safety of both swimmers and boaters, and that he would recommend approval if there were 15 to 20 feet of clearance on each side of the croup pier, and NRC's decision required landowners and easement holders to move their piers so that there would be approximately 16 feet of clearance on each side of the group pier. 312 IAC 11–4–8(c)(1).

13. Eminent Domain ⇐2.17(2)
Water Law ⇐1290

Natural Resources Commission (NRC) decision to grant permit allowing group pier at end of water access easement, which required servient estate owners to move their own pier several feet to the east, did not deprive servient estate owners of all or substantially all of their property's economic or productive use, and thus did not constitute a taking of the servient estate owners' property; a pier had always extended from the easement, servient estate owner had never had the right to exclude anyone from their riparian zone, there was no indication that relocated pier was any less usable, and decision had at best a de minimis impact on the value of the property and the owners' reasonable expectations. U.S.C.A. Const. Amend. 14; West's A.I.C. Const. Art. 1, § 21.

14. Eminent Domain ⇐2.1

A compensable taking may occur even if there is not a "direct seizure" of property. U.S.C.A. Const.Amend. 14; West's A.I.C. Const. Art. 1, § 21.

15. Eminent Domain ⇐2.1

The modern test states that regulation effects a taking if it deprives an owner of all or substantially all economic or productive use of his or her property; this test focuses on several factors, including the

economic impact of the regulation on the claimant, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. U.S.C.A. Const. Amend. 14; West's A.I.C. Const. Art. 1, § 21.

Jere L. Humphrey, Wyland, Humphrey, Wagner & Clevenger, LLP, Plymouth, IN, Attorney for Appellants.

Gregory F. Zoeller, Attorney General of Indiana, Andrew R. Falk, Deputy Attorney General, Indianapolis, IN, Attorneys for Appellee.

OPINION

CRONE, Judge.

Case Summary

Gunther and Carol Kranz own property on Bass Lake that is subject to an easement by other landowners in the Meyers Subdivision ("the Subdivision"). In prior, separate proceedings, the Natural Resources Commission ("the NRC") determined that the easement holders had the right to place a pier at the end of the easement, but they would have to apply for a permit for a group pier ("the Group Pier") from the Department of Natural Resources ("the DNR").[1] The DNR initially denied the permit because it believed that the Group Pier's proximity to neighboring piers created a safety hazard. The easement holders requested a hearing before an administrative law judge ("the ALJ"), who determined that the easement holders should be allowed to have a group pier and that the Kranzes should move their pier to accommodate the Group Pier. The Kranzes appealed to the NRC, which adopted the ALJ's decision.

The Kranzes then sought judicial review in the Starke Circuit Court. The Kranzes advanced four reasons for reversing the NRC's decision: (1) that the NRC lacked jurisdiction to determine property rights; (2) that the decision was arbitrary and capricious because the NRC did not follow its own rule; (3) that the decision was not supported by substantial evidence; and (4) that the decision effected an unconstitutional taking. The trial court affirmed, and the Kranzes appealed to this court. We conclude that the NRC has jurisdiction to render a decision concerning property rights to the extent necessary to implement the permit process. We also conclude that the NRC properly interpreted and applied its own rule. Further, the evidence favorable to the decision is that the safety concerns were alleviated by moving the neighboring piers away from the Group Pier. Finally, we conclude that there was not an unconstitutional taking of the Kranzes' property. Because Bass Lake is a public freshwater lake, the only effect of the NRC's decision on the Kranzes' property rights was to relocate their pier, and there was no indication that the pier was any less usable in the location chosen by the NRC. The decision does not deprive the Kranzes' property of all or substantially all of its economic or productive use and therefore is not an unconstitutional taking. Therefore, we affirm.

Facts and Procedural History

The Kranzes own Lot 49 of the Subdivision. The Kranzes' property is bordered

1. The NRC "is an autonomous board that addresses issues pertaining to the [DNR]. This twelve-member board includes seven citizens chosen on a bipartisan basis, three ex officio members from state agencies, and one representative of the Indiana Academy of Science." *Meet the NRC*, www.in.gov/nrc/2352.htm (last visited June 7, 2010). *See also* Ind.Code § 14-10-1-1 (establishing the NRC).

on the north side by Bass Lake, which is a public freshwater lake. The western fifteen feet of the Kranzes' property is subject to an easement held by the property owners in the Subdivision who do not have lakefront property. Lot 48, which borders the Kranzes' property on the west, is owned by Christopher Bartoszek. For a period of several decades, the easement holders placed a pier ("the Group Pier") at the end of the easement in order to access the lake.

In the spring of 2007, a dispute arose between the easement holders and the Kranzes and Bartoszek regarding the Group Pier. Sometime during 2007, DNR Conservation Officer Brian Culbreth examined the deed creating the easement and determined that it created only a right to a path to the lake, not to placement of a pier in the lake.

On October 15, 2007, the easement holders initiated administrative proceedings before an ALJ to review Officer Culbreth's determination. The Kranzes and Bartoszek were respondents in those proceedings. The DNR was also added as a third-party respondent because of its regulatory authority over the lake.

Each party was ordered to provide the ALJ with a written statement of contentions. The easement holders contended that their easement included the right to place a pier in the lake and, alternatively, that they had obtained such a right through adverse possession. The Kranzes and Bartoszek denied these contentions. The DNR's statement identified four issues: (1) whether the easement contained a grant of riparian rights; (2) if so, whether the right to place a pier in the lake was among those rights; (3) what the dimensions of any riparian zone created by the deed were; and (4) whether the easement holders were required to obtain a permit from the DNR before placing a pier in the lake.[2]

On July 16, 2008, after an evidentiary hearing, the ALJ issued his order. The ALJ found that the deed was ambiguous as to the intent of the easement, and therefore considered extrinsic evidence, including the testimony of easement holders Nancy Adochio, Richard Leadbetter, and Lori Bridegroom. The ALJ found that Richard Leadberter's testimony was particularly persuasive because he had owned property in the Subdivision since 1956 and was able to testify with clarity and specificity as to the historical use of the easement and pier. Leadbetter testified that in 1962, Joseph Meyers, the creator of the Subdivision, gathered the property owners and informed them that the easement was going to be moved from Lot 48 to its present location on Lot 49. Meyers told the easement holders to move their pier to the new location. At various times, railroad ties, wooden beams, or rocks have been placed along the shoreline to control erosion. Currently, there is a stone seawall extending across Lot 49. Leadbetter and Bridegroom testified that a pier was a "practical necessity" for getting over the wall and into the water. *Adochio v. Kranz*, 11 CADDNAR 400, 413 (2008), *available at* www.in.gov/nrc/decision/07-204w.v11.htm. The ALJ found that the Kranzes' and Bartoszek's testimony was partially based on hearsay and was less credible than the easement holders' testimony.

The ALJ found that the easement holders had established, by a preponderance of

2. Riparian rights have been traditionally associated with owners of land abutting a river or stream, while those with shoreline on a lake or pond acquired littoral rights. *Zapffe v. Srbeny*, 587 N.E.2d 177, 178 n. 1 (Ind.Ct.App. 1992), *trans. denied*. However, the term "riparian" is now widely used to refer to both classes of ownership. *Id.*

the evidence, that the easement included the right "to place a pier to facilitate reasonable access to Bass Lake. At a minimum, the pier must afford the ability to safely and conveniently traverse shoreline structures, such as seawalls." *Id.* The ALJ determined that the Group Pier was a structure that required a permit from the DNR. Thus, the easement holders were entitled to place a pier in the lake upon successful completion of the permit process. Neither the Kranzes nor Bartoszek sought judicial review of the decision.

On November 6, 2009, Adochio, as secretary of the Meyers Subdivision Property Owners Association ("the Association"), submitted an application for a group pier on behalf of the Association. The application requested permission for a pier 171 feet in length extending from the easement. It would be three feet wide with a sitting bench and a ladder into the water. On January 18, 2010, Adochio supplemented the application with additional information requested by the DNR. Adochio confirmed that the easement holders did not intend to moor boats at the Group Pier.

The DNR denied the permit for four reasons:

1. the proposed project will both infringe on the access of an adjacent landowner to the public freshwater lake and will unduly restrict navigation
2. public safety is a primary concern due to the very narrow corridor that is created on both sides of the proposed pier; as a result of these narrow corridors, boaters and swimmers are at a real or potential risk when put together in the water at the same time
3. due to the very narrow corridors navigation is unduly restricted; boats cannot safely navigate in these corridors without risking damage to their boats or damage to piers when attempting to navigate in these corridors
4. compatibility with the activities of other riparian owners is infringed upon due to the narrow corridors created

Appellants' App. at 49.

The Association requested review by an ALJ, and an evidentiary hearing was held on July 8, 2010. Easement holders Gail Gorman, Harry Adamek, Bridegroom, and Adochio testified in support of the application. Their testimony indicates that approximately twenty-two properties are part of the Association, and four property owners have opted out of the Association and therefore would not be using the Group Pier, although they could still use the pathway. Easement holders also bring guests with them on occasion. Association members like to sit on the pier or use it to access the water for swimming. A lengthy pier is needed because Bass Lake is generally very shallow, sometimes only waist-deep at the center. Seniors with limited mobility particularly need a pier to get over the seawall. People sometimes bring their boats up to the Group Pier to pick up passengers, but boats would not be moored there. Easement holders kept their boats at a marina or made arrangements with neighbors who had lakefront property.

Use of the Group Pier varies somewhat, with weekends being a little busier and holidays being the busiest time. Adochio testified that about sixteen Association members use the marina instead of the Group Pier, about nine members are senior citizens who use the Group Pier primarily for sitting, and about eleven members use the Group Pier for general recreational purposes. Adochio testified that there were typically four to five people at a time in the area of the Group

Pier and the easement, and even at busier times, usually twelve or fewer.

The easement holders testified that the Bartoszeks and the Kranzes had moved their piers toward the easement to "squeeze [them] out." Tr. at 15. They asserted that there had not been accidents in the past, and there would not be safety or navigational issues if the Bartoszeks and the Kranzes moved their piers toward the center of their shorelines. The Kranzes' pier is 250 feet long, giving them seventy-nine feet that they could use to moor their boat without concern of interference from the Group Pier.

Bartoszek testified that he had moved his pier eastward toward the easement in order to accommodate his neighbor to the west, who needs a relatively wide pier with a ramp due to a disability. Bartoszek testified that sometimes there are twelve to fifteen people swimming near the Group Pier, and he sometimes does not go out in his boat because he does not feel that he can navigate around all the swimmers. His mother, Maria, previously owned the property. She testified that the pier had always been somewhat toward the east end of their property and claimed that it had been moved over further because she and her husband felt that their riparian zone was too crowded.

Gunther Kranz was not able to testify to any actual accidents in the area near the Group Pier, but did testify in detail to practices that he felt were unsafe, such as swimming at night. Gunther asserted that he had avoided safety issues "by avoiding confrontation" or simply not going out on the lake with his boat. *Id.* at 119. He stated that two of the support pipes for his pier had been bumped, but he did not know how it had happened. He testified that generally ten to twelve people at a time used the Group Pier on weekends. He is not always able to pull out directly from his pier, but sometimes must pass through the riparian zone of his neighbor to the east to reach the deeper parts of the lake. The Kranzes' son, Stephen, testified that they had moved their pier because the neighbors to the east had asked them to. He claimed that there were ten to twenty people in the area of the Group Pier on a normal weekend. He stated that there was one occasion when he was bringing his boat into his parents' pier and nearly hit a small child who darted in front of him.

Lieutenant Jerry Shepherd, a conservation officer, testified that he recommended denial of the permit because the configuration of piers created narrow corridors. He was not aware of any accidents in the area of the Group Pier, but felt that the narrow corridors created real potential for safety or navigational issues. Lieutenant Shepherd testified that an average boat is more than ten feet long and would not be able to turn around in the space between the Group Pier and the neighboring piers. Some boaters might not have the skill to back in or out, and the presence of swimmers would also make safe navigation more difficult. Lieutenant Shepherd felt that a Group Pier would be unproblematic if there was fifteen to twenty feet of clearance on each side. Jim Hebenstreit, the assistant director of the DNR's Division of Water, stated that denial of the permit was based on Lieutenant Shepherd's recommendation, and he echoed Shepherd's concerns about navigability and safety.

The ALJ took notice of *Adochio*, which the parties stipulated was entitled to res judicata effect. The parties also stipulated that "appropriate delineation of riparian zones was described by the straight-line extension of property lines." Appellants' App. at 19. The ALJ found that "the site can become crowded with both human and boating traffic. Crowding is likely to be more serious during the weekends, and

particularly the weekends associated with Memorial Day, Independence Day, and the Bass Lake Festival." *Id.* at 26. However, the ALJ found that if the Group Pier "were limited to 3½ feet in width and placed at the center of the 15–foot wide easement, and if [Bartoszek's] pier and the Kranzes' pier were each moved ten feet farther away, Lt. Shepherd's concerns for navigational safety would be resolved." *Id.*

The ALJ ordered Bartoszek to move his pier so that it was seven feet from the line between his property and the Kranzes'. The Group Pier was to be placed nine feet from the western boundary of the easement and two feet from the eastern boundary of the easement. The Kranzes were ordered to move their pier fourteen feet to the east of the eastern edge of the easement. The Association was authorized to construct a pier no longer than 125 feet long. The ladder was permitted, but the sitting bench was not; nor may the Association members moor boats at the Group Pier. Bartoszek and the Kranzes were allowed to have piers up to 300 feet in length and were ordered not to moor boats within the buffer zone that the ALJ created between their piers and the Group Piers.

After the ALJ's order was issued, the Kranzes raised two additional issues, which the ALJ addressed in a supplemental order on December 22, 2010. The Kranzes contended that the NRC lacked jurisdiction "to resolve a dispute concerning riparian ownership." *Id.* at 32. The ALJ rejected that argument, concluding that determination of riparian rights was reasonable and necessary to implement the DNR's statutory powers and duties. The Kranzes also argued that the ALJ's order resulted in an unconstitutional taking. The ALJ found that issue to be waived because it was not timely raised. On January 14, 2011, the NRC affirmed the ALJ's decision and adopted his order as its final order.[3]

On February 8, 2011, the Kranzes filed a petition for judicial review of the NRC's decision in the Starke Circuit Court. The court heard oral argument on November 3, 2011. On November 30, 2011, the court affirmed the NRC's decision. The court held that the NRC "had jurisdiction to determine all issues involved including determination of easements." *Id.* at 39. The court held that the NRC's decision was not arbitrary or capricious, not an abuse of discretion, and not contrary to law. Finally, the court held that restricting the location of the Kranzes' pier was not a "taking." *Id.* The Kranzes now appeal.[4]

Discussion and Decision

The Kranzes seek review of a decision by an administrative agency. Pursuant to the Administrative Orders and Procedures Act, a reviewing court may neither try the case de novo nor substitute its judgment for that of the agency. Ind.Code § 4–21.5–5–11. We give deference to the agency's expertise. *Ind. Dep't of Envtl. Mgmt. v. Schnippel Const., Inc.*, 778 N.E.2d 407, 412 (Ind.Ct.App.2002), *trans. denied.* We do not reverse the agency's decision unless the action is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdic-

3. The NRC's decision is reported in CADDNAR as *Meyers Subdivision POA v. DNR*, 12 CADDNAR 282 (2011), *available at* www.in.gov/nrc/decision/10–093w,v12.htm.

4. Bartoszek was named a defendant in the Kranzes' petition for judicial review, but the record does not reflect that he challenged the NRC's decision, and he is not involved in this appeal.

tion, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. Ind.Code § 4-21.5-5-14(d).

The burden of demonstrating the invalidity of an agency action is on the party asserting its invalidity. Ind.Code § 4-21.5-5-14(a). "A decision is arbitrary and capricious when it is made without any consideration of the facts and lacks any basis that may lead a reasonable person to make the same decision made by the administrative agency." *Schnippel*, 778 N.E.2d at 412. We do not weigh evidence or judge the credibility of witnesses. *Ind. Alcoholic Beverage Comm'n v. River Road Lounge, Inc.*, 590 N.E.2d 656, 658 (Ind.Ct.App.1992), *trans. denied*. Although we accord the agency's interpretation of its governing statutes great weight, we are not bound by the agency's interpretation. *Id.*

The Kranzes challenge the NRC's decision on four grounds: (1) that the NRC lacks jurisdiction to determine property rights; (2) that the decision was arbitrary and capricious because the NRC failed to follow its own rule; (3) that the decision is not supported by substantial evidence; and (4) that the decision results in an unconstitutional taking.

I. Jurisdiction

[1-5] The Kranzes challenge both *Adochio* and the NRC's decision in this case to the extent that the decisions were based on the NRC's determination of the respective parties' property rights. The powers of administrative agencies are limited to those granted by their enabling statutes. *Howell v. Indiana-American Water Co.*, 668 N.E.2d 1272, 1275 (Ind.Ct.App.1996), *trans. denied*. "Thus, a party cannot confer jurisdiction upon an administrative agency by consent or agreement. Any act of an agency in excess of its power is *ultra vires* and void." *Id.* at 1276-77 (citation omitted). "Judgments rendered without personal or subject matter jurisdiction are void and may be directly or collaterally attacked at any time." *Person v. Person*, 563 N.E.2d 161, 163 (Ind.Ct.App.1990), *trans. denied*. "Subject matter jurisdiction cannot be waived, and courts at all levels are required to consider the issue *sua sponte*." *Jernigan v. State*, 894 N.E.2d 1044, 1046 (Ind.Ct.App.2008).

The Lake Preservation Act, Indiana Code Chapter 14-26-2, gives the State "full power and control of all of the public freshwater lakes in Indiana." Ind.Code § 14-26-2-5(d)(1). The State "holds and controls all public freshwater lakes in trust for the use of all of the citizens of Indiana for recreational purposes." Ind.Code § 14-26-2-5(d)(2). The owner of property bordering a public freshwater lake, such as Bass Lake, "does not have the exclusive right to the use of the waters of the lake or any part of the lake."[5] Ind.Code § 14-26-2-5(e).

To protect citizens' interest in public freshwater lakes, the legislature tasked the DNR and NRC with implementing a permit process for placing structures in the lake or along the shoreline:

> (a) Unless a person obtains a permit from the [DNR] under this section and conducts the activities according to the terms of the permit, a person may not conduct the following activities:
>
> (1) Over, along, or lakeward of the shoreline or water line of a public freshwater lake:
>
> ...
>
> (C) place, modify, or repair a temporary or permanent structure.

5. The parties agree that Bass Lake is a public freshwater lake.

(b) An application for a permit for an activity described in subsection (a) must be accompanied by the following:

(1) A nonrefundable fee of one hundred dollars ($100).

(2) A project plan that provides the department with sufficient information concerning the proposed excavation, fill, temporary structure, or permanent structure.

(3) A written acknowledgment from the landowner that any additional water area created under the project plan is part of the public freshwater lake and is dedicated to the general public use with the public rights described in section 5 of this chapter.

(c) The [DNR] may issue a permit after investigating the merits of the application. In determining the merits of the application, the [DNR] may consider any factor, including cumulative effects of the proposed activity upon the following:

(1) The shoreline, water line, or bed of the public freshwater lake.

(2) The fish, wildlife, or botanical resources.

(3) The public rights described in section 5 of this chapter.

(4) The management of watercraft operations under IC 14–15.

(5) The interests of a landowner having property rights abutting the public freshwater lake or rights to access the public freshwater lake.

. . .

(e) The [NRC] shall adopt rules under IC 4–22–2 to do the following:

(1) Assist in the administration of this chapter.

(2) Provide objective standards for issuing permits under this section, including standards for the configuration of piers, boat stations, platforms, and similar structures. The standards:

(A) may provide for a common use if the standard is needed to accommodate the interests of landowners having property rights abutting the public freshwater lake or rights to access the public freshwater lake; and

(B) shall exempt any class of activities from licensing, including temporary structures, if the [NRC] finds that the class is unlikely to pose more than a minimal potential for harm to the public rights described in section 5 of this chapter.

(3) Establish a process under IC 4–21.5 for the mediation of disputes among persons with competing interests or between a person and the [DNR]. A rule adopted under this subsection must provide that:

(A) if good faith mediation under the process fails to achieve a settlement, the [DNR] shall make a determination of the dispute; and

(B) a person affected by the determination of the [DNR] may seek administrative review by the [NRC].

(f) After:

(1) a final agency action in a mediation under subsection (e)(3) that makes a determination of a dispute among persons with competing riparian interests; and

(2) the completion of judicial review or the expiration of the opportunity for judicial review;

a party to the dispute may seek enforcement of the determination in a civil proceeding. The remedy provided under

this subsection is supplemental to any other legal remedy of the party.

Ind.Code § 14–26–2–23.

The DNR contends that Indiana Code Section 14–26–2–23 authorizes it to determine property and riparian rights to the extent necessary to implement the permit process. If we were to hold otherwise, the DNR argues, a person would always have to go to court for a determination of his or her property rights before applying for a permit, an unwieldy procedure that the legislature could not have intended.

[6] The Kranzes argue that the NRC "has no right to determine property rights in the first instance, but can only regulate applicants who already have riparian rights." Appellants' Br. at 6. The Kranzes cite three cases originating in the trial courts to illustrate that jurisdiction lies in the courts rather than an administrative agency: *Brown v. Heidersbach*, 172 Ind. App. 434, 360 N.E.2d 614 (1977); *Klotz v. Horn*, 558 N.E.2d 1096 (Ind.1990); and *Gunderson v. Rondinelli*, 677 N.E.2d 601 (Ind.Ct.App.1997).

Brown concerned a subdivision on Lake George, which had been platted by the Brown family. The Smith family and the Heidersbach family owned lots that were not adjacent to the lake, but they held an easement over the Browns' property for access to the lake. The Browns later platted an addition to the subdivision and removed a pier that the easement owners had placed at the end of their easement. The Smiths and the Heidersbachs filed a complaint against the Browns seeking an injunction to prevent the Browns from expanding the number of persons authorized to use the easement and to prevent the removal of any future piers. The trial court granted the injunctions. We reversed, concluding that the language of the deeds did not convey any riparian rights but created only a pathway to the lake that was not held exclusively by the Smiths and Heidersbachs. *Brown*, 172 Ind.App. at 441–42, 360 N.E.2d at 620.

Klotz concerned a parcel of land abutting Eagle Lake that was owned by the Horn family. The Horns sold the rear portion of the plot to Nedra Sainer, along with a six-foot-wide easement for access to Eagle Lake. Sainer later sold the property to the Klotzes, who placed a pier at the end of the easement. The Horns demanded that the Klotzes remove the pier, but the Klotzes refused, so the Horns sought an injunction. The trial court enjoined the Klotzes from placing a pier or boat at the end of the easement, and we affirmed. Our supreme court reversed, concluding that the language of the deed was ambiguous, and the trial court should have allowed the parties to present parol evidence concerning the original intent of the easement. *Klotz*, 558 N.E.2d at 1098.

Gunderson concerned a subdivision on Lake Myers. Mark Gunderson owned an easement across the Rondinelli family's property for access to the lake. Gunderson placed a boathouse on the easement, installed underground electrical cables, operated motor vehicles on the easement, and cut and piled shrubbery on the easement. The Rondinellis filed a lawsuit seeking to enjoin Gunderson from continuing these activities as well as constructing a pier or mooring boats. The trial court concluded that the easement was intended to create a walking path to the lake, and therefore granted the injunction. Gunderson appealed, and we affirmed, finding that Gunderson relied on evidence that was not favorable to the judgment and was not probative of the original owner's intent. *Gunderson*, 677 N.E.2d at 604.

The Kranzes argue that these decisions demonstrate that jurisdiction over cases concerning the scope of lake access ease-

ments and riparian rights is in the courts rather than the NRC. The Kranzes contend that if the NRC had jurisdiction in cases like *Brown*, *Klotz*, and *Gunderson*, then the plaintiffs' actions would have been dismissed for failure to exhaust administrative remedies.

The parties appear to assume that jurisdiction must lie exclusively with the courts or exclusively with the NRC. That is not necessarily the case. *See, e.g., Midwest Psychological Center, Inc. v. Ind. Dep't of Admin.*, 959 N.E.2d 896, 908–09 (Ind.Ct.App.2011) (discussing the doctrine of primary jurisdiction), *trans. denied.* We need not define the exact parameters of the NRC's jurisdiction. Unlike *Brown*, *Klotz*, and *Gunderson*, the case before us solely concerns placement of a pier on a public freshwater lake. *Brown* and *Gunderson* addressed multiple issues, only one of which was the placement of a pier in a lake. It is not clear from the opinions whether the lakes at issue in *Brown* and *Klotz* were public freshwater lakes.[6] Finally, none of these cases addressed the grant or denial of a permit.

[7] The DNR and NRC are responsible for implementing the statutory process of issuing permits for piers on public freshwater lakes. In adopting rules and issuing permits, the DNR is charged with considering a variety of factors, including the public rights listed in Indiana Code Section 14–26–2–5 and the interests of landowners who own property abutting the lake. Ind.Code § 14–26–2–23(c) and (e)(2). The DNR is also charged with creating a process "for the mediation of disputes among persons with competing interests," and the DNR has the authority to resolve the issues if the parties do not reach a settlement. Ind.Code § 14–26–2–23(e)(3). Finally, Indiana Code Section 14–11–1–6 charges the DNR generally with enforcing the "laws for the conservation and development of the natural resources of Indiana." We conclude that the NRC has jurisdiction to determine the scope of a lake access easement or riparian rights to the extent necessary to carry out the process of issuing permits for the placement of piers on public freshwater lakes.

The Kranzes express concern that the NRC lacks the legal expertise to make legal determinations about the scope of lake access easements or riparian rights. We believe that those concerns are unfounded. The NRC has authority to: (1) administer oaths and certify to official acts; (2) require information from any person for purposes of Title 14; (3) issue subpoenas; (4) require the attendance of witnesses; and (5) examine witnesses under oath. Ind.Code § 14–11–1–3. The proceedings before the ALJ were substantially similar to proceedings before a court. To the extent that construing a deed might approach the outer limits of an ALJ's expertise, the risk of error is reduced by the fact that an affected party can seek review by the NRC, by a trial court, by this court, and potentially by the supreme court. In sum, we do not find the Kranzes' argu-

6. Indiana Code Section 14–26–2–24 requires the NRC to maintain a list of public freshwater lakes, which can be accessed online at www.in.gov/legislative/iac/20110601–IR–312110313NRA.xml.pdf (last visited June 7, 2012). *Gunderson* referred to "Myers Lake in Marshall County," 677 N.E.2d at 602, which is on the list. *Klotz* originated in Elkhart County, but there is no Eagle Lake in Elkhart County. Two Eagle Lakes are on the list, one in Noble County and one in Starke. *Brown* originated in DeKalb County, but there is no Lake George in DeKalb County. Two lakes named George are on the list, one in Lake County and one in Steuben County. The opinions in *Klotz* and *Brown* do not provide any information from which we can determine whether the lakes at issue in those cases are among the four possibilities on the NRC's list.

ments concerning jurisdiction to be availing; therefore, we proceed to the merits of the NRC's decision.

II. Application of NRC Rules

[8] The Kranzes argue that the NRC's decision was arbitrary and capricious because it failed to follow one of its own rules, 312 Indiana Administrative Code 11–4–8(c)(1). That rule states:

> (c) The [DNR] shall condition a license for a group pier so the placement, configuration, and maintenance of the pier . . .:
>
> (1) Provide a reasonable buffer zone between the pier and the:
>
> (A) portion of the lake two hundred (200) feet from the shoreline or water line; and
>
> (B) riparian zone of adjacent property owners to provide for reasonable navigation by the adjacent property owner and by the public. Except as otherwise provided in this clause, the department shall require at least five (5) feet of clearance on both sides of a riparian line (for a total of ten (10) feet). The department may require as much as ten (10) feet of clearance on both sides of a riparian line (for a total of twenty (20) feet) if, based upon the opinion of a qualified professional, additional clearance is required for reasonable navigation. The department may approve an exception to this clause where adjacent riparian owners use a common pier along their mutual property line, and the purposes of this clause are satisfied by waters elsewhere within their riparian zones.

[9–11] The Kranzes argue that the NRC "took fourteen (14) feet from the Kranzes' property[,] seven (7) feet from Bartoszek's lot[;] and none from Meyers subdivision because 'they don't have anything to give up'."[7] Appellants' Br. at 12. We disagree with the Kranzes' interpretation of this rule. Their argument appears to assume that the easement holders have their own riparian zone. "Generally, a property owner whose property abuts a lake, river, or stream possesses certain riparian rights associated with ownership of such a property." *Center Townhouse Corp. v. City of Mishawaka*, 882 N.E.2d 762, 767 (Ind.Ct.App.2008), *trans. denied*. Riparian rights "are special rights pertaining to the use of water in a waterway adjoining the owner's property," and may include access, swimming, fishing, bathing, boating, and installation of a pier. *Daisy Farm Ltd. v. Morrolf*, 886 N.E.2d 604, 607 (Ind.Ct.App.2008), *trans. denied*. Holders of a lake access easement do not acquire riparian rights, but may acquire the right to "*use* the riparian rights of the servient tenant." *Klotz*, 558 N.E.2d at 1097.

In *Adochio*, the NRC determined that the easement included the use of the Kranzes' riparian rights in the area corresponding to the boundaries of the easement. This fifteen-foot area is not a separate riparian zone, but falls entirely within the Kranzes' riparian zone. Thus, the references in 312 Indiana Administrative Code 11–4–8(c)(1) to riparian lines and zones do not refer to the boundaries of the easement, but to the boundaries of the Kranzes' riparian zone. Both the Group Pier and the Kranzes' pier are entirely within the Kranzes' riparian zone, and both piers are at least five feet from the boundaries of the Kranzes' riparian zone.

The Kranzes' argument also appears to assume that the ten-foot buffer on each side of the Group Pier must fit entirely within the easement. However, the rule

7. The Kranzes do not supply a citation for the phrase in quotation marks.

plainly states that there must be "five (5) feet of clearance on both sides of a riparian line." 312 Ind. Admin. Code 11–4–8(c)(1)(B). In other words, there must be five feet of clearance between Bartoszek's pier and the Bartoszek–Kranz riparian line, and five feet of clearance between the riparian line and the Group Pier. On its face, the rule does not appear to address the amount of clearance that should exist between the Group Pier and the Kranzes' pier, which are both located in the same riparian zone. Nevertheless, the NRC created a buffer of approximately sixteen feet, which is consistent with the spirit of the rule. Thus, we conclude that the NRC correctly applied 312 Indiana Administrative Code 11–4–8(c)(1).

III. Sufficiency of Evidence

[12] The Kranzes next argue that the NRC's decision is not supported by substantial evidence because none of the reasons for the original denial of the permit have been alleviated. Lieutenant Shepherd testified that his primary concern was that the existing configuration of the piers created narrow corridors, which would make navigation more difficult and pose a threat to the safety of both swimmers and boaters. He also stated that he would recommend approval if there were fifteen to twenty feet of clearance on each side of the Group Pier. The NRC's decision required Bartoszek, the easement holders, and the Kranzes to move their piers so that there would be approximately sixteen feet of clearance on each side of the Group Pier. The evidence favorable to the NRC's decision supports its conclusion that the new configuration of the piers remedies the original reasons for denying the permit for the Group Pier.

IV. Constitutionality

[13] The Kranzes argue that the NRC's decision expanded the easement and appropriated fourteen feet of their riparian zone. The Kranzes argue that their property was taken for a private use, which is prohibited by both the Fourteenth Amendment of the United States Constitution and Article 1, Section 21 of the Indiana Constitution. However, the issue of whether a taking is for a public or private purpose is beside the point if there is no taking in the first place. The NRC did not create a riparian zone for the easement holders, nor did it appropriate any portion of the Kranzes' riparian zone. The easement holders, along with any member of the general public, have always had a right to use any portion of Bass Lake. Likewise, the Kranzes are not required to stay out of the fifteen-foot easement or the buffer between their pier and the Group Pier. Nor are the Kranzes prohibited from venturing into other neighbors' riparian zones to access their pier.

[14, 15] The only effect of the NRC's order on the Kranzes is to restrict the area in which they may place a pier. A compensable taking may occur even if there is not a "direct seizure" of property. *Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570, 577 (Ind.2007).

The modern test states that regulation effects a taking if it deprives an owner of all or substantially all economic or productive use of his or her property. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538–40, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). *See also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 & n. 8, 1030, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). This test focuses on several factors: the economic impact of the regulation on the claimant, the extent to which the regulation interferes with reasonable investment-backed expectations, and the

character of the government action. *Dep't of Natural Res. v. Ind. Coal Council, Inc.*, 542 N.E.2d 1000, 1003 (Ind. 1989); *Penn Cent.*, 438 U.S. at 124, 98 S.Ct. 2646.

Id. at 577–78 (footnote omitted).

The record reflects that there has been a pier extending from the easement since 1962, when the easement over Lot 49 was created. The NRC found that the Kranzes were aware of this usage: "The Kranzes and Bartoszek purchased their lots with knowledge of the existence and use of the subject easement. The Kranzes were formerly beneficiaries of the subject easement.[8] At the time of their purchases, various lot owners placed piers and moored boats within the subject easement." Appellants' App. at 29. When the NRC confirmed the easement holders' right to place a pier at the end of the easement, the Kranzes chose not to appeal that decision. The public has always had a right to use any portion of the lake, and the Kranzes have never had the right to exclude anyone from their riparian zone.

It is apparent that the lake is more crowded than the Kranzes would prefer. It is also apparent that some people who use the lake are not as safety-conscious and polite as the Kranzes would like. These problems do not stem from the NRC's decision. Given the nature of the public's right to use the lake, the NRC's decision has at best a de minimis impact on the value of the Kranzes' property and their reasonable expectations.

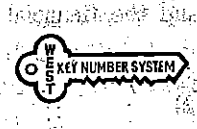
The NRC's decision does not restrict the Kranzes' use of the lake, but merely requires them to move their pier several feet to the east. The record reflects that the Kranzes had previously placed their pier toward the center or the eastern edge of their riparian zone. There is no indication that the pier is any less usable at the location chosen by the NRC. The Kranzes' only proffered reason for moving their pier toward the easement was that they wished to give their neighbor to the east more space. The NRC's decision was designed to enable all the property owners in the Subdivision to enjoy the lake safely, something that the property owners themselves had not been able to accomplish without government intervention. The character of the government action is to resolve a dispute among property owners and to protect the public interest in the lake. The NRC's decision does not deprive the Kranzes of all or substantially all of their property's economic or productive use; therefore, the Kranzes have not demonstrated that the NRC's decision was a "taking" requiring compensation.

Conclusion

The Kranzes have failed to show that the NRC lacked jurisdiction in this case or the factually related *Adochio* case. Nor have they shown that the NRC's decision was arbitrary and capricious or unsupported by substantial evidence. The NRC's decision is neither a physical nor a regulatory taking in violation of the state or federal constitutions. Therefore, the trial court was correct to affirm the NRC's decision, and we likewise affirm.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.



8. The Kranzes previously owned a lot in the Subdivision that was not a lakefront property.

["*Kranz* 2"]

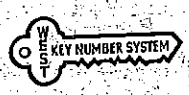
Kranz v. Meyers Subdivision Property Owners, 973 N.E.2d 615 (Ind. App. 2012)

Joint Motion to Vacate should be granted. *Id.* at 18–19. Thus, the trial court noted specifically that Johnson's statement and deposition "demonstrate facts extremely relevant to the responsible corporate officer doctrine and whether there is a genuine issue of material fact." *Id.* The court considered Johnson's statement and deposition together with "the latitude of T.R. 54(B), [and] the important nature of the newly designated evidence." *Id.* Indeed, this new evidence challenged the accuracy, if not the truthfulness, of Mitchell's affidavit. The January Order relied on Mitchell's affidavit, in which he stated, among other things, that "I never dumped nor was I at any time involved in any capacity in the dumping of[,] chemical waste on Plaintiff's real estate." *Id.* at 40. The trial court found that the new evidence "directly refutes the conclusions of the [January Order]" on the question of Mitchell's personal liability. Given our standard of review, the fundamental distinction between an interlocutory order and a final judgment, and the trial court's reasoning, we cannot say that the court's Order to Vacate was an abuse of discretion.

In sum, in this case the trial court entered two correct judgments. When the court entered the January Order, the designated evidence did not demonstrate a genuine issue of material fact as to Mitchell's liability, and the court properly granted partial summary judgment for him as a matter of law. But because the judgment was and remained interlocutory, after the LLC tendered new evidence that established a genuine issue of material fact on the question of Mitchell's personal liability, the trial court properly exercised its discretion to vacate the January Order and reinstate Mitchell as a defendant. The Order to Vacate was neither against the logic and effect of the facts and circumstances before the court nor contrary to law. Thus, we hold that the court's Order to Vacate was not reversible error.

Affirmed.

RILEY, J., and BARNES, J., concur.



Gunther KRANZ and Carol Kranz, Appellants–Petitioners,

v.

MEYERS SUBDIVISION PROPERTY OWNERS ASSOCIATION, INC., Christopher Bartoszek, and Indiana Department of Natural Resources, Appellees–Respondents.

No. 75A03–1112–PL–577.

Court of Appeals of Indiana.

Aug. 28, 2012.

Background: Owners of servient estate lakefront property, which was subject to easement held by other subdivision residents, sought judicial review of Natural Resource Commission (NRC) which determined that the easement holders were entitled to place a group pier at the end of the easement and which required property owners to move their own pier to accommodate that pier. The Circuit Court, Starke County, Roger V. Bradford, J., affirmed, and servient estate owners appealed. The Court of Appeals, 969 N.E.2d 1068, affirmed.

Holding: On rehearing, the Court of Appeals, Crone, J., held that NRC did not intend to create a separate riparian zone for easement holders.

Affirmed.

1. Administrative Law and Procedure ⇐413

An agency's interpretation of its own regulations is typically accorded great weight.

2. Water Law ⇐1290

Natural Resources Commission (NRC) did not intend to create a separate riparian zone for subdivision easement holders when it determined that the easement holders were entitled to place a group pier at the end of the easement and required riparian property owners to move their own pier to accommodate that pier; while NRC opinion contained references to the easement holders having a riparian zone and comment describing line on property diagram referred to easement holders having a riparian zone, NRC cited and clearly intended to apply caselaw holding that an easement holder does not acquire riparian rights but may acquire the right to use the riparian rights of the servient estate, and comment describing line reflected that easement holders' alleged riparian zone was subsumed within property owners' own zone. 312 IAC 11–4–8(c)(1).

Jere L. Humphrey, Wyland, Humphrey, Wagner & Clevenger, LLP, Plymouth, IN, Attorney for Appellants.

Gregory F. Zoeller, Attorney General of Indiana, Andrew R. Falk, Deputy Attorney General, Indianapolis, IN, Attorneys for Appellee.

OPINION ON REHEARING

CRONE, Judge.

Case Summary

Gunther and Carol Kranz petition for rehearing in the case of *Kranz v. Meyers Subdivision Property Owners Association*, 969 N.E.2d 1068 (Ind.Ct.App.2012). We grant rehearing solely to clarify why we believe that our interpretation of a regulation promulgated by the Department of Natural Resources ("the DNR") is consistent with that of the agency's. Therefore, we reaffirm our original opinion in all respects.

Facts and Procedural History

The Kranzes own property on Bass Lake that is subject to an easement by other landowners in the Meyers Subdivision ("the Subdivision"). In prior, separate proceedings, the Natural Resources Commission ("the NRC") determined that the easement holders had the right to place a pier at the end of the easement, but they would have to apply for a permit for a group pier ("the Group Pier") from the DNR. The DNR initially denied the permit, and the easement holders requested a hearing before an administrative law judge ("the ALJ"), who determined that the easement holders should be allowed to have a group pier and that the Kranzes should move their pier to accommodate the Group Pier. The Kranzes appealed to the NRC, which adopted the ALJ's decision.

The Kranzes then sought judicial review in the Starke Circuit Court. The Kranzes advanced four reasons for reversing the NRC's decision: (1) that the NRC lacked jurisdiction to determine property rights; (2) that the decision was arbitrary and capricious because the NRC did not follow its own rule; (3) that the decision was not supported by substantial evidence; and (4) that the decision effected an unconstitutional taking. The trial court affirmed, and the Kranzes appealed to this Court.

On appeal, we held that: (1) the NRC has jurisdiction to render a decision concerning property rights to the extent necessary to implement the permit process; (2) that the NRC properly interpreted and

applied its own rule; (3) that the evidence favorable to the decision supported the NRC's ruling; and (4) that there was not an unconstitutional taking of the Kranzes' property. *Id.* at 1080.

[1] The Kranzes filed a petition for rehearing in which they argue that our interpretation of the DNR regulation at issue is not consistent with the way in which the agency interpreted it.[1] Recognizing that an agency's interpretation of its own regulations is typically accorded great weight, we grant rehearing to clarify why we believe that our interpretation of the regulation is consistent with the NRC's. *See Ind. Dep't of Envtl. Mgmt. v. Steel Dynamics, Inc.*, 894 N.E.2d 271, 274 (Ind. Ct.App.2008) ("[A]n interpretation of statutes and regulations by the administrative agency charged with enforcing those statutes and regulations is entitled to great weight, and the reviewing court should accept the agency's reasonable interpretation of such statutes and regulations, unless the agency's interpretation would be inconsistent with the law itself."), *trans. denied* (2009).

Discussion and Decision

On appeal, the Kranzes argued that the NRC's decision was arbitrary and capricious because it failed to follow one of its own rules, 312 Indiana Administrative Code 11–4–8(c)(1). That rule states:

> (c) The [DNR] shall condition a license for a group pier so the placement, configuration, and maintenance of the pier . . .:
>
> (1) Provide a reasonable buffer zone between the pier and the:
>
> (A) portion of the lake two hundred (200) feet from the shoreline or water line; and
>
> (B) riparian zone of adjacent property owners to provide for reasonable navigation by the adjacent property owner and by the public. Except as otherwise provided in this clause, the department shall require at least five (5) feet of clearance on both sides of a riparian line (for a total of ten (10) feet). The department may require as much as ten (10) feet of clearance on both sides of a riparian line (for a total of twenty (20) feet) if, based upon the opinion of a qualified professional, additional clearance is required for reasonable navigation. The department may approve an exception to this clause where adjacent riparian owners use a common pier along their mutual property line, and the purposes of this clause are satisfied by waters elsewhere within their riparian zones.

312 Ind. Admin. Code 11–4–8(c)(1).

The Kranzes argued that this rule required ten feet of clearance between each side of the Group Pier and the boundaries of the easement; therefore, because the easement is only fifteen feet wide, the permit had to be denied. We noted that the rule requires only five feet of clearance on each side of a riparian line. We further held that the easement owners did not have their own riparian zone, but merely had the right to use a portion of the Kranzes' riparian rights. *See Kranz*, 969 N.E.2d at 1079 (citing *Klotz v. Horn*, 558 N.E.2d 1096, 1097 (Ind.1990)). Thus, we explained the application of the rule as follows:

1. The Kranzes raise two additional issues, which we believe were adequately addressed in our original opinion.

In *Adochio*,[2] the NRC determined that the easement included the use of the Kranzes' riparian rights in the area corresponding to the boundaries of the easement. This fifteen-foot area is not a separate riparian zone, but falls entirely within the Kranzes' riparian zone. Thus, the references in 312 Indiana Administrative Code 11–4–8(c)(1) to riparian lines and zones do not refer to the boundaries of the easement, but to the boundaries of the Kranzes' riparian zone. Both the Group Pier and the Kranzes' pier are entirely within the Kranzes' riparian zone, and both piers are at least five feet from the boundaries of the Kranzes' riparian zone.

In other words, there must be five feet of clearance between Bartoszek's pier and the Bartoszek–Kranz riparian line, and five feet of clearance between the riparian line and the Group Pier.[3] On its face, the rule does not appear to address the amount of clearance that should exist between the Group Pier and the Kranzes' pier, which are both located in the same riparian zone. Nevertheless, the NRC created a buffer of approximately sixteen feet, which is consistent with the spirit of the rule. Thus, we conclude that the NRC correctly applied 312 Indiana Administrative Code 11–4–8(c)(1).

Id. at 1079–80.

[2] In their petition for rehearing, the Kranzes argue that the NRC did intend to create a separate riparian zone for the easement holders. We acknowledge that there are a few references in the NRC's opinion to the easement holders having a riparian zone; however, reading the opinion as a whole, we conclude that these references are nothing more than a few isolated instances of lack of precision in the use of a term of art. The NRC cited and clearly intended to apply *Klotz*, which held that an easement holder does not acquire riparian rights, but may acquire the right to use the riparian rights of the servient estate. The greater number of the NRC's findings are consistent with *Klotz*. *See e.g.*, Appellants' App. at 12 (stating that the Subdivision holds an easement "which crosses a portion of the lands and the riparian waters of the Kranzes"); *id.* at 13 (again stating that the subdivision holds an easement "over the lands and riparian waters of the Kranzes" and describing the subdivision's riparian rights as "derivative"); *id.* at 15 (setting forth the *Klotz* rule and stating that the easement holders "are not riparian owners"); *id.* at 19 (noting that the parties had stipulated that the "appropriate delineation of riparian zones was described by the straight-line extension of property lines").

The Kranzes argue that paragraph 77 of the NRC's order indicates that it intended to create a separate riparian zone for the easement holders. That paragraph included a diagram of the Kranzes' property, Bartoszek's property, and the easement. A line marked "1" extends from the Kranz–Bartoszek property line (which is also the western border of the easement) into Bass Lake. The text of paragraph 77 contains the following description of line 1:

> This solid line is the straight-line extension into Bass Lake of the common terrestrial property line of Bartoszek Lot 48 and Kranz Lot 49 and depicts the delineation of riparian zones between those properties. In addition, the line depicts the delineation of riparian zones

2. *Adochio v. Kranz*, 11 CADDNAR 400, 413 (2008), *available at* www.in.gov/nrc/decision/07–204w.v11.htm.

3. Bartoszek is the Kranzes' neighbor to the west; the Bartoszek–Kranz property line is also the western boundary of the easement.

between Bartoszek Lot 48 and the subject easement.

Id. at 31. While this comment seems to refer to the easement holders having a riparian zone, it also reflects that that zone is subsumed within the Kranzes' riparian zone. Although this language is not a very precise application of *Klotz*, the end result is essentially correct and consistent with our opinion.

Finally, the Kranzes rely on the statement of contentions that the DNR submitted in the *Adochio* case and the testimony of Lieutenant Shepherd, a conservation officer who had originally recommended denial of the permit for the Group Pier. However, the NRC is the final authority for interpreting the regulation at issue, and as explained above, we believe that our opinion is consistent with how the NRC interpreted it. Therefore, we reaffirm our previous opinion in all respects.

VAIDIK, J., and BRADFORD, J., concur.

Terrell HAWKINS, Appellant–Petitioner,

v.

STATE of Indiana, Appellee–Respondent.

No. 49A04–1201–CR–12.

Court of Appeals of Indiana.

Aug. 28, 2012.

Background: Incarcerated inmate requested educational credit time for college courses taken while in correctional facility. The Marion Superior Court, Steven R. Eichholtz, J., denied request. Inmate appealed.

Holdings: The Court of Appeals, Garrard, Senior Judge, held that:

(1) statutory amendment providing that state funding for postsecondary education programs in correctional facilities could not be used to assist inmates confined for felony convictions was not an unconstitutional ex post facto law;

(2) correctional facility's distinction between inmates who were allowed to complete degree program following statutory amendment eliminating state funding for postsecondary education programs in correctional facilities and inmate at issue, who was not so allowed, had rational basis and thus did not violate equal protection rights of inmate; and

(3) statute providing that an inmate earns credit time if inmate "successfully completes requirements to obtain . . . an associate's degree" provided credit time only for completing degree program and did not authorize partial credit for partial completion.

Affirmed.

1. Constitutional Law ⇐2791

An ex post facto law applies retroactively to disadvantage an offender's substantial rights. U.S.C.A. Const. Art. 1, § 9, cl. 3; West's A.I.C. Const. Art. 1, § 24.

2. Constitutional Law ⇐2789, 2790

Court determines whether a particular statute is an ex post facto law by examining whether the change increases the penalty by which a crime is punishable or alters the definition of criminal conduct. U.S.C.A. Const. Art. 1, § 9, cl. 3; West's A.I.C. Const. Art. 1, § 24.

Bass v. Salyer, 923 N.E.2d 961 (Ind. App. 2010)

923 N.E.2d 961
(Cite as: 923 N.E.2d 961)

Court of Appeals of Indiana.
Jerry W. BASS, Bettye A. Bass, Jack E. Sutton, and Kathy L. Sutton, Appellants-Defendants,
v.
Jeffrey C. SALYER and Renea M. Salyer, Appellees-Plaintiffs.
No. 43A03-0904-CV-186.

March 17, 2010.

Background: Property owners brought action to quiet title in a prescriptive easement over a vacated, formerly public, drive connecting their property to a lake, and in the riparian area, and to the parcel owners who took title to the drive after it was vacated from interfering with the use of such easement. After a bench trial, the Superior Court, Kosciusko County, Rex L. Reed, Special Judge, entered judgment in favor of the property owners. Parcel owners appealed.

Holdings: The Court of Appeals, Najam, J., held that:
(1) property owners did not have a prescriptive easement to the drive absent adverse and exclusive use, and
(2) the owners had no property interest in the land abutting the riparian area, and thus, could not acquire riparian rights by prescription.

Reversed.

West Headnotes

[1] Easements 141 ⚿5

141 Easements
141I Creation, Existence, and Termination
141k4 Prescription
141k5 k. In general. Most Cited Cases
Prescriptive easements are not favored in the law, and the party claiming a prescriptive easement must meet stringent requirements.

[2] Easements 141 ⚿37

141 Easements
141I Creation, Existence, and Termination
141k37 k. Questions for jury. Most Cited Cases
Whether a prescriptive easement exists is a question of fact.

[3] Dedication 119 ⚿19(1)

119 Dedication
119I Nature and Requisites
119k16 Acts Constituting Dedication
119k19 Designation in Maps or Plats, and Sale of Lots
119k19(1) k. In general. Most Cited Cases
The owner who plats a street and acknowledges the plat and has it approved and recorded grants to the municipality, in trust for the public, title to an easement for a street.

[4] Easements 141 ⚿5

141 Easements
141I Creation, Existence, and Termination
141k4 Prescription
141k5 k. In general. Most Cited Cases

Easements 141 ⚿36(3)

141 Easements
141I Creation, Existence, and Termination
141k36 Evidence
141k36(3) k. Weight and sufficiency. Most Cited Cases
A claimant cannot prevail on a prescriptive easement claim if he fails to prove any one of the four elements of control, intent, notice, and duration.

[5] Easements 141 ⚿7(4)

141 Easements
141I Creation, Existence, and Termination

141k4 Prescription
141k7 Duration and Continuity of Use
141k7(4) k. Period of limitation, or statutory period. Most Cited Cases

Easements 141 ⚖8(2)

141 Easements
141I Creation, Existence, and Termination
141k4 Prescription
141k8 Adverse Character of Use
141k8(2) k. Use by permission or agreement. Most Cited Cases

Easements 141 ⚖8(4)

141 Easements
141I Creation, Existence, and Termination
141k4 Prescription
141k8 Adverse Character of Use
141k8(4) k. Exclusiveness of use. Most Cited Cases
During the time that easement over drive was a dedicated public easement, property owners could not demonstrate adverse and exclusive use required to show intent to claim full ownership, superior to others, and therefore, property owners did not establish prescriptive easement over the drive; use of drive did not become adverse until drive was vacated as public easement, and such use did not satisfy duration of prescriptive period.

[6] Dedication 119 ⚖63(2)

119 Dedication
119II Operation and Effect
119k63 Abandonment or Nonuser
119k63(2) k. Failure to use or improve. Most Cited Cases
The public's failure to use a dedicated way does not affect the easement granted under the dedication.

[7] Easements 141 ⚖8(1)

141 Easements
141I Creation, Existence, and Termination
141k4 Prescription
141k8 Adverse Character of Use
141k8(1) k. In general. Most Cited Cases
A necessary corollary to the doctrine of prescription, in the context of a prescriptive easement, is the principle that the owner of the record title who has been duly placed on notice of an adverse claim can defeat that claim by timely asserting his property rights and objecting to the claimant's use.

[8] Easements 141 ⚖8(4)

141 Easements
141I Creation, Existence, and Termination
141k4 Prescription
141k8 Adverse Character of Use
141k8(4) k. Exclusiveness of use. Most Cited Cases
Private prescriptive easement claimant's right of access under a public easement is not "exclusive," so as to demonstrate intent to claim full ownership superior to others, precisely because that right is shared with others.

[9] Trial 388 ⚖395(3)

388 Trial
388X Trial by Court
388X(B) Findings of Fact and Conclusions of Law
388k395 Sufficiency in General
388k395(3) k. General or specific findings or conclusions. Most Cited Cases

Trial 388 ⚖395(5)

388 Trial
388X Trial by Court
388X(B) Findings of Fact and Conclusions of Law
388k395 Sufficiency in General
388k395(5) k. Ultimate or evidentiary facts. Most Cited Cases
Special findings by a trial court must contain all facts necessary to recovery by a party and the ultimate facts from which the court has determined the

legal rights of the parties.

[10] Appeal and Error 30 ⚿850(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k844 Review Dependent on Mode of Trial in Lower Court
30k850 General or Special Findings
30k850(1) k. In general. Most Cited Cases

Trial 388 ⚿395(1)

388 Trial
388X Trial by Court
388X(B) Findings of Fact and Conclusions of Law
388k395 Sufficiency in General
388k395(1) k. In general. Most Cited Cases
A court on review must determine whether specific findings are adequate to support a trial court's decision; trial court's findings are adequate if they disclose a valid basis under the issues to support the result reached in the judgment, and are inadequate if they fail to disclose a valid basis for the conclusions and judgment.

[11] Easements 141 ⚿8(2)

141 Easements
141I Creation, Existence, and Termination
141k4 Prescription
141k8 Adverse Character of Use
141k8(2) k. Use by permission or agreement. Most Cited Cases
A permissive use cannot be adverse so as to ripen into an easement by prescription.

[12] Water Law 405 ⚿1778

405 Water Law
405X Prescriptive Rights in Water or for Use or Access to Waters
405k1770 Elements of Prescription
405k1778 k. Claim or color of right. Most Cited Cases
Property owners who, while using a dedicated public easement over a drive to access lake, built a pier on the lake at the point of access, had no property interest in the land abutting the lake, and thus, could not acquire riparian rights by prescription after the dedicated public easement was vacated and title to the drive went to adjacent tract owners; property owners had no fee simple or prescriptive interest to the drive, or other land abutting the lake.

[13] Water Law 405 ⚿1225

405 Water Law
405VI Riparian and Littoral Rights
405VI(A) In General
405k1225 k. Who are riparian owners, and what is riparian land. Most Cited Cases
A claimant must have a property interest in the land appurtenant to the water before he can acquire rights to use the water.

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OPINION

NAJAM, Judge.

STATEMENT OF THE CASE

Jerry W. Bass, Bettye A. Bass, Jack E. Sutton, and Kathy L. Sutton (collectively "the Lot Owners") appeal from the trial court's judgment in favor of Jeffrey C. Salyer and Renea M. Salyer on the Salyers' complaint to quiet title in a prescriptive easement over the Lot Owners' property and in the riparian area abutting that property. We restate and address the following issues on appeal:

*963 1. Whether the trial court erred when it con-

cluded that the Salyers had established a prescriptive easement over the underlying fee simple title of the Lot Owners within a drive previously platted and dedicated as a public easement.

2. Whether the trial court erred when it concluded that the Salyers had established a prescriptive easement in the riparian area of a lake abutting the Lot Owners' property.

We reverse.

FACTS AND PROCEDURAL HISTORY

In 1951 a plat was filed in the Kosciusko County Recorder's Office that established the "Roy Hohman Subdivision on Yellow Creek Lake, Kosciusko County, Indiana" ("the Subdivision"). Plaintiff's Exhibit 3. Two lots in the Subdivision abut the north side of County Road 850 South ("C.R. 850"), an east-west road. On the south side of C.R. 850, the remainder of the Subdivision consists of a row of lots that abut the road and a row of lots that abut Yellow Creek Lake to the south, with a drive running generally east-west between the two rows of lots. Yellow Creek Lake is the southern boundary of the Subdivision. Lots 10 and 17 of the Subdivision abut the south side of C.R. 850. The plat also contains a north-south drive ("the Drive") running between Lots 10 and 17.[FN1] The Drive connects C.R. 850 with Yellow Creek Lake.

FN1. Although the plat also contains an east-west path marked Adrive, @ our references to Athe Drive@ refer only to the north-south drive at issue in this appeal.

In 1969, Cecil and Susan Salyer ("the Salyer parents") purchased a parcel of property on the north side of C.R. 850. That parcel is not part of the Subdivision but is located across C.R. 850 from Lots 10 and 17. The Salyer parents and their family routinely accessed Yellow Creek Lake via a path down the center of the Drive, and, by 1972, they had installed a pier ("the Salyer pier") in Yellow Creek Lake where the Drive meets the lake. Pier posts were installed on the shore, and the pier rested on cement blocks on the shore. From 1972 to May 2008, the Salyer parents and their family maintained the pier in that location and moored a boat on one or both sides of the pier.

On September 20, 1994, the Kosciusko County Board of Commissioners ("the Board") passed Ordinance Number 1994-12Z, which vacated the northern portion of the Drive from where it abutted C.R. 850 to the southern boundaries of Lots 10 and 17 ("First Vacated Tract").[FN2] By that act, title to the vacated portion of the Drive was transferred to the adjacent property owners. The western half of the vacated portion of the Drive was transferred to the owners of Lot 10 and the eastern half of the vacated portion of the Drive was transferred to the owners of Lot 17. On November 16, 2004, the Board vacated an additional portion of the Drive when it passed Ordinance Number 04-11-16-001V ("Second Vacated Tract").[FN3] That portion of the Drive runs from the southern boundary of Lot 17 to the lake and terminates at the riparian area where the Salyers built their pier. Title to the Second Vacated Tract was transferred to the owners of Lot 17. ***964** And on January 8, 2008, the Board passed Ordinance Number 08-01-08-001V, which vacated the remaining portion of the Drive ("Third Vacated Tract"). The Third Vacated Tract abuts Lot 10 to the north, Lot 16 to the south, and the Second Vacated Tract to the east. Title to the Third Vacated Tract was transferred to the owners of Lot 10, who also owned Lot 16.

FN2. The 1994 ordinance was recorded September 28, 1994.

FN3. Ordinance 04-11-16-001V was recorded February 9, 2005. The trial court found that the ordinance was passed on the recording date. But the parties do not contest the date of this ordinance, nor is the particular date of passage or recording material to resolve the issues presented in this appeal.

In 1995, Jeffrey Salyer purchased the Salyer parcel from his mother, Susan Salyer. As of 2008, the Basses owned Lot 10, Lot 16, the western part of the First Vacated Tract, and all of the Third Vacated Tract, and the Suttons owned Lot 17, the eastern half of the First Vacated Tract, and all of the Second Vacated Tract.[FN4] On May 26, 2008, the Basses and the Suttons removed the Salyer pier. On June 27, 2008, the Salyers filed a complaint to quiet title in a prescriptive easement over the real estate formerly platted as the Drive between C.R. 850 and Yellow Creek Lake and in the riparian area and to enjoin the Basses and the Suttons from interfering with the Salyers' use of that easement.

> FN4. Jack Sutton had purchased Lot 17 from his parents in 1991, who had owned the property since 1977. The Basses had purchased Lots 10 and 16 in 2006.

A bench trial was held on February 16, 2009. On April 8, 2009, the trial court entered judgment in favor of the Salyers. The court made special findings and conclusions under Trial Rule 52(A). The Basses and Suttons now appeal.

DISCUSSION AND DECISION

Standard of Review

The trial court entered findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A). We may not set aside the findings or judgment unless they are clearly erroneous. *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210 (Ind.2000). First, we consider whether the evidence supports the factual findings. *Id.* Second, we consider whether the findings support the judgment. *Id.* "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind.1996). A judgment will be clearly erroneous either when there is "no evidence supporting the findings or the findings fail to support the judgment." *Chidester v. City of Hobart*, 631 N.E.2d 908, 910 (Ind.1994). A judgment is also clearly erroneous when the trial court applies the wrong legal standard to properly found facts. *Yanoff v. Muncy*, 688 N.E.2d 1259, 1262 (Ind.1997). While findings of fact are reviewed under the clearly erroneous standard, appellate courts do not defer to conclusions of law, which are reviewed de novo. *Fobar v. Vonderahe*, 771 N.E.2d 57, 59 (Ind.2002).

Prescriptive Easements

[1] Prescriptive easements are not favored in the law. *Carnahan v. Moriah Prop. Owners Ass'n., Inc.*, 716 N.E.2d 437, 441 (Ind.1999). For that reason "the party claiming [a prescriptive easement] must meet 'stringent requirements.' " *Id.* (citations omitted, alteration in original). Formerly, a party claiming the existence of a prescriptive easement was required to provide evidence showing "an actual, hostile, open, notorious, continuous, uninterrupted adverse use for twenty years under a claim of right." *Id.* Further, " 'each ... element [ ] ... [had to] be established as a necessary, independent, ultimate fact, the burden of showing which is on the party asserting the prescriptive title, and the failure to find any one such element [is] fatal ..., for such failure to find is construed as a finding against it.' " *Id.* (citation omitted, alteration in original).

*965 [2] But in *Wilfong v. Cessna Corp.*, 838 N.E.2d 403 (Ind.2005), our Supreme Court modified the traditional elements of prescriptive easements to correspond to the Court's recently reformulated elements of adverse possession:

> In our recent decision, *Fraley v. Minger*, 829 N.E.2d 476 (Ind.2005), we reviewed the history of the doctrine of adverse possession in Indiana and reformulated the elements necessary for a person without title to obtain ownership to a parcel of land. We held that the claimant in such circumstances must establish clear and convincing proof of (1) control, (2) intent, (3) notice, and (4) duration.[FN5] *Id.* at 486. This reformulation ap-

plies as well for establishing prescriptive easements, save for those differences required by the differences between fee interests and easements.

> FN5. These four elements are established by clear and convincing proof of the following:
>
> (1) Control-The claimant must exercise a degree of use and control over the parcel that is normal and customary considering the characteristics of the land (reflecting the former elements of "actual," and in some ways "exclusive," possession);
>
> (2) Intent-The claimant must demonstrate intent to claim full ownership of the tract superior to the rights of all others, particularly the legal owner (reflecting the former elements of "claim of right," "exclusive," "hostile," and "adverse");
>
> (3) Notice-The claimant's actions with respect to the land must be sufficient to give actual or constructive notice to the legal owner of the claimant's intent and exclusive control (reflecting the former "visible," "open," "notorious," and in some ways the "hostile," elements); and,
>
> (4) Duration-the claimant must satisfy each of these elements continuously for the required period of time (reflecting the former "continuous" element).
>
> *Fraley,* 829 N.E.2d at 486.

Wilfong, 838 N.E.2d at 406 (footnote in original). Whether a prescriptive easement exists is a question of fact. *Capps v. Abbott,* 897 N.E.2d 984, 988 (Ind.Ct.App.2008).

The Lot Owners contend that the trial court erred when it concluded that the Salyers had proved all of the elements required to establish a prescriptive easement. Specifically, the Lot Owners contend that, "[s]o long as the Drive remained dedicated to Kosciusko County and under its control, all members of the public had a right to use it." Appellant's Brief at 10. And they argue that, because the Drive was dedicated as a public way, the Salyers have neither proved adverse use nor met the prescriptive period. The Salyers counter that they have met their burden to prove adverse use of the property of "the Basses and Suttons as private owners of the underlying fee simple title" in the area marked on the plat as the Drive and in the riparian area where the Drive meets the lake.[FN6] Appellees' Brief at 15.

> FN6. The Salyers also suggest that the Lot Owners waived review of the trial court's determination on the prescriptive easement because the Lot Owners did not frame their argument in terms of the elements now required to establish a prescriptive easement. As discussed above, the Salyers are correct that the Indiana Supreme Court has recently reformulated the elements of prescriptive easements. But that reformulation did not constitute a material change in the type of evidence required. Instead, the new elements merely recategorize of the former elements, as shown by the supreme court's definition of the new elements in terms of the former ones. *See Fraley,* 829 N.E.2d at 486. Moreover, the Salyers have not cited any legal authority to support their contention. We have no difficulty in following the Lots Owners' arguments and will consider their claim on the merits.

In their complaint the Salyers sought to establish a prescriptive easement "for the purpose of access to Yellow Creek Lake, placing a pier in the waters of Yellow Creek Lake and docking a boat in the waters of Yellow Creek Lake [.]" Appellants' App. at 25. The trial court likewise ***966** considered the issues of access to the lake and use of the riparian area as a single issue. But we will first consider the prescriptive easement claim regarding access over

the Drive and will then turn to the same claim regarding the riparian area. We believe that this is the most logical approach given that, as discussed below, a property interest in the land appurtenant to a riparian area is a condition precedent to riparian rights.

1. The Drive

[3] Between 1951 and, at the earliest, 1994, Kosciusko County held a public easement over and across the Drive. The Kosciusko County Board of Commissioners approved the Subdivision plat on July 2, 1951, and the plat was recorded on July 5, 1951. It is well-settled that "the owner 'who plats a street and acknowledges the plat and has it approved and recorded grants to the municipality, in trust for the public, title to an easement for a street [.]' " *Poznic v. Porter County Dev. Corp.*, 779 N.E.2d 1185, 1192 (Ind.Ct.App.2002) (quoting *Beaman v. Smith*, 685 N.E.2d 143, 147 (Ind.Ct.App.1997)). Thus, when the Board of Commissioners approved the plat and the plat was recorded, there was a statutory dedication of the Drive. And when the Drive was dedicated, the county acquired title to an easement over the Drive in trust for the public. *See id.*

[4] The arguments advanced by the Lot Owners and the Salyers depend upon whether the use of the Drive by the Salyers (and their predecessors in title) was adverse to the fee simple title of the Lot Owners during the period when the Drive was a dedicated public easement. As explained above, a claimant cannot prevail on a prescriptive easement claim if he fails to prove any one of the four elements of control, intent, notice, and duration. *Carnahan*, 716 N.E.2d at 441. In this case we hold that the element of intent is dispositive.

[5] Intent reflects the former elements of "claim of right," "exclusive," "hostile," and "adverse." *Fraley*, 829 N.E.2d at 486. In this context, intent is not subjective but is determined by objective, observable conduct measured against the applicable legal standard. Here, the question presented is whether while the Salyers were using a public easement over the Drive to access the lake, they perfected an adverse claim to a prescriptive easement over the Drive against the Lot Owners. We will also consider whether the Salyers' use of the Drive was exclusive.

On the question of intent, the trial court found in relevant part that:

> *The interest of* [*the Salyers*] *and* [*their*] *predecessors in title* to the access to their pier over two and one-half feet (2 1/2) on each side of the centerline extended to the drive located between Lots 10 and 17 on the Roy Homan Subdivision on Yellow Creek Lake *is unique and distinct from any interest claimed by the public in what had been the public way shown on that plat.* The use by Plaintiffs and Plaintiffs' predecessors in title was a use of the underlying fee simple title of Defendants and Defendants' predecessors in title and not the use of a public way as described on the Roy Hohman Subdivision on Yellow Creek Lake [plat.]

Appellants' App. at 4 (emphases added). The trial court then concluded that, with respect to the area formerly occupied by the public easement, that the Salyers "have demonstrated their intent to claim the right of access to the water's edge ... superior to the rights of all others and in particular superior to the rights of adjacent owners." Appellants' App. at 10.

The Salyers contend that under *967*Daisy Farm Limited Partnership v. Morrolf*, 886 N.E.2d 604 (Ind.Ct.App.2008), *trans. denied* (" *Daisy Farm I* "), they may acquire prescriptive rights in the fee simple interest of the Lot Owners underlying the public easement across Lots 10 and 17. The question presented in *Daisy Farm I* was whether the claimant's use of real property that was burdened in part by a public easement could ripen into title by adverse possession of the underlying fee simple title. On that question, we held that prescriptive rights can be established against the underlying fee

holder of land burdened by an easement in favor of the public, but only if there is sufficient evidence to satisfy all four elements of adverse usage in addition to the permitted use under the easement. *Id.* at 611. We remanded for the trial court to determine whether Daisy Farm, the claimant, had met that burden. *Id.* On remand, the trial court found that Daisy Farm and its predecessors in title had failed to exert "sufficient control, intent, notice, and duration in addition to permitted use" by others to acquire title by adverse possession. *Daisy Farm Ltd. Partnership v. Morrolf,* 915 N.E.2d 480, 485 (Ind.Ct.App.2009) (" *Daisy Farm II* "). We affirmed on appeal based on Daisy Farm's failure to establish the element of control.[FN7] *Daisy Farm II,* 915 N.E.2d at 489.

> FN7. In *Daisy Farm II,* in dictum we also considered whether the claimant had paid taxes on the real estate. The payment of taxes is not an element required to establish a prescriptive easement.

In *Brown v. Heidersbach,* 172 Ind.App. 434, 360 N.E.2d 614 (1977), we considered the claim of a prescriptive easement over a recorded easement providing access to a lake similar to the claim asserted by the Salyers in this case. In *Brown* the recorded easement was not platted for use by the public but was created by grants contained in deeds. The owners of the dominant estates brought an action for an injunction declaring their right to exclusive use and possession of the easement and to prevent the owners of the servient estates from expanding the number of persons authorized to use the easement. The trial court enjoined the servient owners from interfering with the dominant owners' right to the peaceful use and possession of the easement "as the same has been enjoyed by [them] and their predecessors in title for more than twenty years last past" and restricted use of the easement to the dominant owners and their successors in interest. *Id.* at 618.

In *Brown,* we reversed the trial court's conclusion and judgment that the owners of the dominant estates had acquired an exclusive prescriptive easement over the same easement granted in the deeds. We noted that if an easement is enjoyed under a deed there can be no adverse enjoyment until the expiration of the right under the deed, *id.* at 618, and we held that:

> Since the use was not adverse, the easement cannot be expanded by prescription into an exclusive easement. The use of the land for access was expressly permissive. If the facts and circumstances of a case lead to the conclusion that the user was merely permissive, they are fatal to the prescription.

Id. at 621.

Here, too, the Salyers' use of the public easement was permissive. Like the dominant owners of the easement created by deeds in *Brown,* as members of the public the Salyers were granted use of a platted Drive for access to the lake. And, just as in *Brown,* their use of the Drive was consistent with the grant of the public easement and did not become adverse until their right to use the easement expired when the Drive was vacated.

***968** From 1969 until the Board vacated the Drive by ordinances passed between 1994 and 2008,[FN8] the period of time in question during which the Salyers used the Drive, the Drive in its entirety was a dedicated public way. *See Poznic,* 779 N.E.2d at 1192. Nevertheless, the trial court found that the Salyers' use of the Drive was "unique and distinct," presumably because they used the Drive to access the pier that they had built, maintained, and used in the riparian area.[FN9] But, the Salyers have not shown that their use of the Drive to access the lake from C.R. 850 exceeded the grant of the easement created by the statutory dedication and, thus, have not met the burden of *Daisy Farm I* or *Brown.* In other words, because the Salyers' use of the Drive to access the lake was a use permitted under the public easement, they have not shown that their use was adverse to the Lot Owners' underlying fee simple title.

FN8. We acknowledge that the Salyers used the Drive following its vacation in three installments. Use following each vacation could have been adverse as to the fee simple title in the vacated tract. But the first act vacating a portion of the Drive occurred in 1994, less than twenty years ago. Because the prescriptive period is twenty years, the Salyers cannot establish adverse use for the prescriptive period following vacation of any tract of the Drive.

FN9. As discussed below, any valid claim of an interest in the pier and the riparian area is ancillary to and contingent upon whether the Salyers had a property interest in the abutting land.

[6] The Salyers would have had no right to enter upon the Drive were it not for the public easement. We do not subscribe to the Trojan Horse argument that while the Salyers were enjoying use of the public easement, their permissive use concealed an adverse claim to a prescriptive easement over the same area. Having used the public easement for its intended purpose, to access the lake, the Salyers cannot demonstrate that their use was at the same time under a claim of right, exclusive, hostile, or adverse to the fee simple title of the Lot Owners. *See Fraley,* 829 N.E.2d at 486. Because the Salyers have not shown adverse use, they have not shown an intent to use the Drive in a manner superior to the rights of all others, including the Lot Owners. FN10 *See id.*

FN10. The trial court also found that the Drive was "not routinely used by the public." Appellants' App. at 8. But the public's failure to use a dedicated way does not affect the easement granted under the dedication. *See Zakutansky v. Kanzler,* 634 N.E.2d 75 (Ind.Ct.App.1994) ("frequency of use is unimportant and a road is nonetheless a highway though rarely used, if used by those who desire to go that way.") (internal quotation omitted).

[7] It is significant, if not controlling, that until the Drive had been vacated, the Lot Owners had no standing or authority to challenge or prohibit the Salyers' use of the Drive for access between C.R. 850 and the lake. A necessary corollary to the doctrine of prescription is the principle that the owner of the record title who has been duly placed on notice of an adverse claim can defeat that claim by timely asserting his property rights and objecting to the claimant's use. Here, however, during the period when the easement over the Drive was platted and dedicated to the public, the Salyers' use of the Drive for access to the lake was derived from, and entirely dependent upon, the public easement. Thus, it cannot be said that the Lot Owners acquiesced in the Salyers' adverse use of their fee simple title when the Salyers used a public easement to access the lake. *See Bauer v. Harris,* 617 N.E.2d 923, 927 (Ind.Ct.App.1993) (prescriptive easement is established in part by continuous***969** adverse use with knowledge and acquiescence of servient owner).

Further, the Salyers have not demonstrated "exclusive" use sufficient to establish a private prescriptive easement over the Drive. Under the *Fraley* and *Wilfong* reformulation of the elements necessary to establish a prescriptive easement, the element of intent also includes the former element of "exclusive." *See Fraley,* 829 N.E.2d at 486. In *Bauer,* we considered what constitutes exclusive use of a prescriptive easement where the right-of-way at issue was also used by others. Citing the longstanding precedent of *DeShields v. Joest,* 109 Ind.App. 383, 34 N.E.2d 168, 170 (1941), we said:

> " 'By ["]exclusive,["] the law does not mean that the right[-]of[-]way must be used by one person only, because two or more persons may be entitled to the use of the same way, but simply that *the right should not depend for its enjoyment upon a similar right in others,* and that the party claiming it exercises it under some claim existing in his favor, independent of all others. *It must be exclusive as against the right of the community at large.*' "

Bauer, 617 N.E.2d at 927 (citation omitted). Thus, in *Bauer,* we held that, in the context of a prescriptive easement, the term "exclusive use" means an independent claim of right, a use which does not depend upon use by others; it does not mean a use which excludes others entirely, *Id.* at 928.

[8] The dispute in *Bauer* was entirely between private parties. But the well-settled rule followed in *Bauer* is even more compelling here where access to the lake was by means of a platted public easement. Here, it is clear that the Salyers' right of access to and from the lake was not independent but relied entirely upon the general public's right to use the dedicated Drive. The Salyers' right of access to the lake depended upon a "similar right in others" granted in the plat, and it cannot be said that they had any right of access "exclusive as against the right of the community at large." *See id.* at 927. A claimant's right of access under a public easement is not exclusive precisely because that right is shared with others. As such, the Salyers' use of the Drive was not in the least an exclusive use, and they have wholly failed, as a matter of law, to demonstrate the exclusive use of the Drive required to demonstrate intent to establish a private prescriptive easement against the underlying fee simple title of the adjoining Lot Owners.

[9][10] Special findings must contain all facts necessary to recovery by a party and the ultimate facts from which the court has determined the legal rights of the parties. *Matter of Estate of Kroslack,* 570 N.E.2d 117, 121 (Ind.Ct.App.1991). A court on review must determine whether the specific findings are adequate to support the trial court's decision. *Id.* The findings are adequate if they disclose a valid basis under the issues to support the result reached in the judgment. *Id.* Likewise, special findings are inadequate if they fail to disclose a valid basis for the conclusions and judgment. *Bauer,* 617 N.E.2d at 927.

Here, even as a properly found fact, *see Yanoff,* 688 N.E.2d at 1262, the trial court's finding that the Salyers had a "unique and distinct" interest in access to the pier is not a valid basis to support the legal conclusion that they acquired, for their exclusive use and benefit, a prescriptive easement to the water's edge. This finding is inadequate as a matter of law because the Salyers' use of the public easement over the Drive was neither adverse to the Lot Owners nor superior to the rights of all others. The pier facilitated the Salyers' access to the lake, but whatever*970 recreational or personal property interest the Salyers had in the pier, they did not have a real property interest in the pier, and they used a public easement-not a private easement-to reach it. The ultimate facts, the facts that determine the legal rights of the parties, are that the Salyers' use of the Drive to access the lake was, at all relevant times, a permitted use under the easement and a non-exclusive right shared with the public.

Indeed, the judgment does not address the public easement. While the public easement is the single most significant fact in this case, the trial court's findings and conclusions barely acknowledge it. The public easement is conspicuous by its absence in the special findings and the elephant in the room of the judgment on appeal. The easement is referred to only indirectly and tangentially as "a drive" or "the drive" on the subdivision plat or "what had been the public way." The findings and conclusions do not squarely address either the fact or the nature, extent and legal effect of the public easement, and to that extent, the findings and conclusions are inadequate to support the judgment.

[11] In sum, the Salyers' use of the Drive to access the lake was permissive, that is, their use of the Drive was a permitted use under the public easement. A permissive use cannot be adverse so as to ripen into an easement by prescription. *Brown,* 360 N.E.2d at 621. A right shared with the public is, by definition, non-exclusive. And where, as here, the use was not adverse, the easement cannot be expanded by prescription into an exclusive easement. *See id.* Thus, the Salyers have not demonstrated the adverse and exclusive use required to establish an intent to use the underlying fee and have not estab-

lished a prescriptive easement within the Drive. Accordingly, the trial court's judgment on this issue is clearly erroneous.

2. The Riparian Area

[12][13] We next consider whether the Salyers have established a prescriptive easement in the riparian area where the Drive meets the lake.[FN11] Riparian rights have been described as follows:

> FN11. Riparian rights have been traditionally associated with owners of land abutting a river or stream, while those with shoreline on a lake or pond acquired littoral rights. *Zapffe v. Srbeny,* 587 N.E.2d 177, 178 n. 1 (Ind.Ct.App.1992). *trans. denied.* But the term "riparian" is now widely used to refer to both classes of ownership, *id.,* and we use that term here.

Generally, a property owner whose property abuts a lake, river, or stream possesses certain riparian rights associated with ownership of such a property. *Parkison v. McCue,* 831 N.E.2d 118, 128 (Ind.Ct.App.2005), *trans. denied; see also Watson v. Thibodeau,* 559 N.E.2d 1205, 1208 (Ind.Ct.App.1990) (riparian rights are appurtenant to the shore land owned in fee title); *Brown v. Heidersbach,* 172 Ind.App. 434, 440, 360 N.E.2d 614, 619 (1977) (riparian owner acquires his rights to the water from his fee title to the shore land). The term "riparian rights" indicates a bundle of rights that turn on the physical relationship of a body of water to the land abutting it. Robert E. Beck, *Waters and Water Rights* § 6.01(a) at 6-7 (2001). Riparian rights are special rights pertaining to the use of water in a waterway adjoining the owner's property. 78 Am. Jur. 2d Waters § 30 (2002). Riparian rights of the owners of lands fronting navigable waters are derived from common law as modified by statute. 65 C.J.S. Navigable Waters § 82 (2000). According to some authorities, riparian rights do not ***971** necessarily constitute an independent estate and are not property rights per se; they are merely licenses or privileges. *Id.* Stated differently, they constitute property rights of a qualified or restricted nature. *Id.*
Ctr. Townhouse Corp. v. City of Mishawaka, 882 N.E.2d 762, 767-68 (Ind.Ct.App.2008), *trans. denied.* In other words, a claimant must have a property interest in the land appurtenant to the water before he can acquire rights to use the water. *See id.*

Although riparian rights arise from ownership of the land appurtenant to the water, we have also held that one may acquire a prescriptive easement in riparian rights. In *Bromelmeier v. Brookhart,* 570 N.E.2d 90 (Ind.Ct.App.1991), *trans. denied,* we held that the dominant estate holder of a prescriptive easement may use the riparian rights of the servient tenant. *Id.* at 91-92. In *Bromelmeier,* a couple owned property across the road from lots that abutted a lake. A ten-foot-wide "strip" ran between two of the lake lots. *Id.* at 91. For more than twenty years, the couple used that strip to access the lake. They also installed a pier where the strip met the water. Subsequently, the lakeside lot owners on either side of the strip purchased the ten-foot-wide strip and erected a barrier across it.

The couple filed suit claiming that they had established a prescriptive easement in both the ten-foot-wide strip and the lot owners' riparian rights in the lake. The trial court agreed that the couple had acquired a prescriptive easement for access to the lake, but the court found riparian rights were "unavailable to those merely holding an easement." *Id.* On appeal, the parties did not dispute the establishment of a prescriptive easement in the ten-foot-wide strip, but the couple challenged the court's determination that an easement cannot be established in riparian rights.

We held that resolution of the issue turned on the intent of the parties when they created the easement. *Id.* at 92. Specifically, "[w]here adequately demonstrated, the purpose and intent to use the riparian rights of a servient tenant become part of an

easement acquired by prescription." *Id.* Based on the evidence in that case, we held that the couple had used the strip to access the lake for the installation and use of a pier and the surrounding water for the prescriptive period. *Id.* As such, we held that, as easement titleholders, the couple had also established a prescriptive easement in the riparian rights of the lakeside lot owners. *Id.* at 93. We note, however, that unlike in this case, *Bromelmeier* involved only a dispute between private parties, and there was no public easement for access to the lake in question.

Here, as in *Bromelmeier,* we have been asked to determine whether owners of real property that does not abut a lake have established a prescriptive easement in a path to access the lake and in riparian rights to the lake. In separate paragraphs the trial court concluded that the Salyers had established a prescriptive easement in the Drive and also in the riparian area. Having already determined that the Salyers have not established a prescriptive easement in the Drive, we must next determine whether they have established a prescriptive easement in the riparian rights to the lake.

In its judgment, the trial court held that:

> [The Salyers] are the owners of an easement in the riparian area of [the Lot Owners] in Yellow Creek Lake, Kosciusko County, Indiana, described as follows:
>
> *972 Six feet (6') on either side of the centerline of a "drive" between Lots 10 and 17, extended into the water of Yellow Creek Lake a reasonable distance, as shown in the Plat of the Roy Hohman Subdivision on Yellow Creek Lake, recorded in Plat Book 4, page 5 in the Office of the Recorder of Kosciusko County, Indiana.

Appellants' App. at 11. This paragraph defines the area of water in which the trial court concluded that the Salyers had established riparian rights.

Again, "[t]he term 'riparian rights' indicates a bundle of rights that turn on the physical relationship of a body of water to the land abutting it." *Water and Water Rights* § 6.01(a) at 6-7. Here, the Salyers have no fee simple interest in any real property abutting Yellow Creek Lake. And, as we have determined above, they have not established a prescriptive easement within the Drive that connected C.R. 850 and Yellow Creek Lake. The Salyers have not cited and we have not found any precedent holding that one may acquire riparian rights by prescription where the claimant has no property interest in the land abutting the riparian area. Thus, on the facts presented, we conclude that the Salyers have not established a prescriptive easement in the riparian area defined in the trial court's judgment.

Our decision in *Bromelmeier* supports this result. There, we held that the owner of property that did not abut the lake had established a prescriptive easement in riparian rights based on the parties' intent when they created the easement appurtenant for the purpose of access to the lake. *Bromelmeier,* 570 N.E.2d at 92. As we stated, "[w]here adequately demonstrated, the purpose and intent to use the riparian rights of the servient tenant *become a part of* an easement acquired by prescription." *Id.* (emphasis added). Thus, implicit in our holding is that the claimant's riparian rights were contingent upon having a real property interest in the property adjacent to the lake. In other words, a prescriptive easement may be established in a riparian area only if the claimant has a fee simple interest or other vested right to use the property that abuts the riparian area.

Likewise, in *Brown* we considered whether riparian rights inure to the dominant estate of a lakeside easement. The dominant owners contended that the access easement to the lake included more than mere access and that the easement created riparian rights incident to the easement, including the right to dock boats in the lake at a pier attached to the easement. Following the Michigan Supreme Court as well as similar cases from Minnesota and New

York, we held that the grants creating the easement to the lake conveyed no riparian rights and that, absent an express grant, the dominant titleholder of a lakeside easement, the easement titleholder, does not hold the riparian rights inherent in the servient titleholder. *Id.* at 619-20.

Here, the Salyers have no fee simple interest in property abutting the lake. Nor have they established a prescriptive easement in the Drive that abuts the riparian area any greater than the public easement that has been vacated. Thus, we hold that the trial court erred when it held that the Salyers had established a prescriptive easement in the riparian area where the former Drive meets Yellow Creek Lake.

Conclusion

We conclude as a matter of law that the Salyers have not proved that they own a prescriptive easement over the Drive. The Salyers' contention that they demonstrated an intent to use the Drive adverse to the interests of the underlying fee simple title holders is not supported by the ***973** trial court's finding that the Salyers' use of the Drive was "unique and distinct." Rather, the evidence supports a finding that while the Salyers built a private pier to facilitate their use of the lake, they used the public easement over the Drive to access the lake, which was a permitted use, the very purpose for the easement, and a right shared with the public. The Salyers have also not shown the establishment of a prescriptive easement in the Lot Owners' riparian rights. Again, riparian rights arise from a claimant's interest in the land abutting the water. Because the Salyers own neither a fee simple interest nor a prescriptive easement abutting the lake, they cannot and have not established a prescriptive easement in the Lot Owners' riparian rights. To the extent the trial court found to the contrary, the trial court's findings and conclusions are clearly erroneous.

Reversed.

FRIEDLANDER, J., and BRADFORD, J., concur.
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